

*In the Matter of Richard Davis, Police Sergeant (PM2542D),
Township of Parsippany-Troy Hills*
DOP Docket No. 2006-2833
(Merit System Board, decided June 7, 2006)

Richard Davis, represented by Gina Mendola Longarzo, Esq., appeals the attached determination of the Division of Human Resource Information Services, which denied the appointing authority's request to add his name to the December 15, 2005 certification of the Police Sergeant (PM2542D), Township of Parsippany-Troy Hills, eligible list.

The Police Sergeant (PM2542D), Township of Parsippany-Troy Hills, eligible list was promulgated on December 19, 2002, containing the names of 35 eligibles, and it was originally scheduled to expire on December 18, 2005. The list was subsequently extended "for one year . . . or until a new list becomes available, whichever occurs first." See *In the Matter of Promotional Lists for Public Safety Titles* (MSB, decided April 7, 2004). Prior to the scheduled expiration of the eligible list, the eligibles ranked first and second were appointed, effective May 3, 2005. On December 15, 2005, a second certification was issued to the appointing authority, containing the name of the third ranked eligible, Michael Jasiiecki. On December 20, 2005, the name of the fourth ranked eligible, Thomas Carney, was added to the certification, since Jasiiecki was no longer employed by the appointing authority. It is noted that the appointing authority was required to dispose of this certification by March 15, 2006. Carney was appointed, effective December 16, 2005.

A new eligible list for Police Sergeant (PM2551G), Township of Parsippany-Troy Hills, was issued on January 4, 2006 and was promulgated on January 12, 2006. It is scheduled to expire on January 11, 2009. To date, three certifications of the eligible list have been issued, and three appointments have been made, effective January 12, 2006, March 8, 2006, and April 19, 2006. The appellant is ranked 10th on the PM2551G eligible list.

On January 5, 2006, Michael T. Filippello, the Police Chief, telephoned the Department of Personnel (DOP) and requested that the appellant, the sixth ranked eligible¹ on the PM2542D list, be certified for permanent appointment to Police Sergeant, effective January 12, 2006. This request was submitted to the DOP in writing on January 6, 2006 and was endorsed by Henry Sunyak, the Township's Personnel Director. Filippello noted that the Township passed an ordinance on December 20, 2005, which created a vacancy in the title of Police Lieutenant. He indicated that it was his intention to fill the newly created Police Lieutenant vacancy and the resultant Police Sergeant vacancy. The ordinance was to take

¹ It is noted that the fifth ranked eligible, Richard Pantina, was permanently appointed to the title of Police Sergeant from a prior eligible list.

effect on January 12, 2006. Filippello indicated that he had not requested the addition of the appellant's name earlier because he was awaiting approval from the new Mayor, Michael Luther. Luther's recent election had been challenged in the Superior Court. When the challenge to the election results was dismissed on January 4, 2006, Filippello received Luther's verbal approval to fill the vacancy. In response, HRIS advised Filippello that it was unable to grant the request. Specifically, HRIS noted that the PM2542D list was extended for one year or until a new list becomes available, and it concluded that the list expired upon the issuance of the PM2551G list on January 4, 2006. Thus, when the January 5 and 6, 2006 requests were made, HRIS found that the PM2542D list was expired and was no longer available for certification.

On appeal, the appellant recounts the passage of the Township ordinance on December 20, 2005 and the subsequent delays in Filippello's receipt of approval from Luther to fill a Police Sergeant vacancy. The appellant emphasizes that the Police Chief, with the approval of Luther and Sunyak, requested that his name be certified for appointment on January 5, 2006. While the appellant recognizes that the subsequent eligible list was issued on January 4, 2006, he contends that this list was not available until its promulgation date on January 12, 2006. He notes that this interpretation is supported by the DOP's definition of "promulgation date" as the effective date after a list has been fully developed and is ready for certification.² The appellant argues that the appointing authority advised of its desire to fill a vacancy in the Police Sergeant title prior to the effective date of the PM2551G list, and the DOP erroneously denied this request because it believed that the subsequent list became effective on the date of its issuance, January 4, 2006. He contends that "if an unpublished internal procedure exists [to invalidate an eligible list once a new list is issued], it may run directly counter to the purposes of the Civil Service Act," and it may violate the rule-making requirements of the Administrative Procedure Act. Finally, the appellant underscores that Filippello, Luther, and Sunyak wish to promote him to the title of Police Sergeant, and he submits a certification from Filippello to that effect. Other than Filippello's certification, the appointing authority has not submitted any arguments or documentation for the Board's consideration.

CONCLUSION

It is settled that the DOP may only issue a certification or extend a certification disposition due date to fill genuine vacancies, *i.e.*, not anticipated vacancies. See *N.J.A.C.* 4A:4-4.1(a), *N.J.A.C.* 4A:4-4.8(b), and *In the Matter of William J. Brennan* (MSB, decided April 9, 2003), *aff'd*, *William J. Brennan v. New Jersey Department of Personnel*, Docket No. A-4412-02T5 (App. Div. February 24, 2005). In the instant matter, one genuine vacancy existed as of the date of the

² This definition comes from the Department of Personnel's "terminology dictionary," found on the website: <http://www.state.nj.us/personnel/termdict/index.htm>.

December 15, 2005 certification of the PM2542D list. That vacancy was filled through the appointment of Carney on December 16, 2005. Subsequently, the Township Council passed an ordinance on December 20, 2005 that created a new Police Lieutenant position. There is no dispute in the record that Michael T. Filippello, the Police Chief, and Henry Sunyak, the Township's Personnel Director, wished to fill this newly created Police Lieutenant position and the resultant Police Sergeant vacancy upon the passage of the ordinance. Due to the change in administration and legal challenge to the election of Michael Luther as Mayor, Luther was unable to issue his approval for the filling of these two vacancies until January 4, 2006, when his election to the office of Mayor was upheld in court. In light of this series of events, the Board finds that a genuine Police Sergeant vacancy existed on January 4, 2006. In this regard, the approval of the Township Council and Mayor had been given to make an appointment to the new Police Lieutenant position and to fill the vacancy created by the promotion of a Police Sergeant to fill the Police Lieutenant position.

Thus, when Filippello contacted the DOP via telephone on January 5, 2006, he was requesting a valid certification to fill a genuine vacancy in the title of Police Sergeant. However, his request was denied on the basis that the PM2542D list expired upon the issuance of the subsequent Police Sergeant (PM2551G) eligible list on January 4, 2006. The Board disagrees. The DOP utilizes two dates of significance for eligible lists. The first date, the issue date of the list, represents the date on which the list is initially compiled and provided to the appointing authority for review. The promulgation date, which is typically one week after the issue date, is the date on which the eligible list is available for certification and appointment. It must be emphasized that, when a list is issued, the appointing authority is not yet able to utilize the list to make appointments. In accordance with the Board's decision in *In the Matter of Promotional Lists for Public Safety Titles* (MSB, decided April 7, 2004), the PM2542D list was extended for "one year . . . or until a new list becomes available, whichever occurs first." (Emphasis added). Given that the PM2551G list became available for certification and appointment when it promulgated on January 12, 2006, the PM2542D list expired on January 11, 2006, not upon the new list's issuance. In this regard, an eligible list is not available, within the meaning of the Board's prior decision, when it is issued. Between the issue and promulgation dates, certifications of an eligible list cannot be issued, and appointments cannot be made. Therefore, on the date on which Filippello requested that the appellant's name be certified for appointment, January 5, 2006, there existed a genuine Police Sergeant vacancy and a valid eligible list, PM2542D. The DOP should have complied with Filippello's request and certified the appellant's name for appointment at that time.

In light of the above, it is necessary to grant the appellant relief in the instant matter. However, the Board notes that candidates who appear on an eligible list do not possess a vested property interest in employment. The only

interest that results from placement on an eligible list is that the candidate will be considered for a vacant position so long as the eligible list remains in force. See *Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). As noted above, the appellant was deprived of his interest in being considered for a vacancy during the life of the eligible list. Keeping in mind that he only enjoyed a right to be considered, i.e., he had no vested interest in appointment, the Board finds that the appropriate remedy is to revive the Police Sergeant (PM2542D) eligible list for the appellant's benefit and certify his name at the time of the next certification. If the appellant is appointed at this time, and upon completion of his working test period, he should be awarded a retroactive date of permanent appointment of January 12, 2006, the date on which he could have been appointed but for the failure to certify his name.

ORDER

Therefore, it is ordered that this appeal be granted and that the list for Police Sergeant (PM2542D), Township of Parsippany-Troy Hills be revived, and the appellant's name certified at the time of the next certification. It is further ordered that, if appointed and upon successful completion of his working test period, the appellant receive a retroactive date of permanent appointment of January 12, 2006 for salary step placement and seniority-based purposes only.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.